TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:
H.B. NO. 2560, H.D. 1, RELATING TO CORPORATIONS.

BEFORE THE:
HOUSE COMMITTEE ON FINANCE

DATE: Wednesday, March 2, 2016 **TIME:** 11:00 a.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General supports the intent of this bill, but submits comments regarding the bill’s consistency with other provisions of Hawai‘i law and the bill's ability to survive a constitutional challenge. This bill would require corporations incorporated under Hawai‘i law or foreign corporations authorized to transact business here to file detailed annual reports disclosing to their shareholders the money spent to influence elections. We make three suggestions to improve the bill's chances of surviving a potential constitutional challenge and several drafting suggestions. The Department respectfully asks that this Committee pass the bill only if these changes are made.

Because this bill touches upon speech that is protected under the First Amendment, we make three suggestions to improve the bill's chances of surviving a constitutional challenge. The rationale behind the bill should be articulated in the legislative history used to support it. Expenditures and contributions made to influence an election are protected speech under United States Supreme Court precedent. Buckley v. Valeo, 424 U.S. 1 (1976). By law, corporations are also entitled to this protected speech. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). This bill would require information regarding this protected speech to be provided to the shareholders in an annual report. Campaign finance laws often require similar forms of disclosure. Disclosure laws, if properly crafted and not unduly burdensome, are generally constitutional under the First Amendment. To survive a constitutional challenge, however, the law must meet an intermediate form of scrutiny called "exacting scrutiny." Under this test, the government's interest behind the law must be "sufficiently important" and the law must be "substantially" related to that interest. See Yamada v. Snipes, 786 F.3d 1182, 1194 (9th Cir.), *cert. denied sub nom.* Yamada v. Shoda, 136 S. Ct. 569 (2015) ("Because the challenged laws provide for the disclosure and reporting of political spending but do not limit or ban contributions or expenditures, we apply exacting scrutiny. To survive this scrutiny, a law must bear a substantial relationship to a sufficiently important governmental interest. Put differently, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.") (citations and internal quotation marks omitted). For campaign finance disclosure bills, the government's interest lies in informing the electorate and restoring public confidence in elected government. Id. at 1196-97.

Similarly, to survive review under exacting scrutiny, the disclosure interest at issue must be "sufficiently important." Because the information is sought for the corporation's *shareholders*, rather than the electorate, this is a distinct disclosure interest that differs from the interest generally underlying most campaign finance laws. To improve the bill's chances of surviving a constitutional challenge, the Legislature's interests behind this bill should be fully articulated in the legislative history and be of sufficient importance to meet the exacting scrutiny test. This goal would be assisted by including facts demonstrating that this form of disclosure is necessary for effective corporate governance.

We recommend that the disclosure threshold ($1000 in a year, page 3, lines 15-16) be made consistent with existing law. We suggest a $1000 threshold *in an election period*, which matches the threshold in current law for other campaign finance purposes. Section 11-321(g), HRS. See also Yamada 786 F.3d at 1199 (relying on $1000 threshold to uphold definition of noncandidate committee). This provision would also be improved by specifying that this threshold is an *aggregate* amount (page 3, line 15).

We also urge the Committee to strengthen the bill by adding more cross-references to the definitions of the critical terms. In addition to “contribution” and “independent expenditure,” the terms “election,” “noncandidate committee” and “candidate committee” should be defined by reference to section 11-302, Hawaii Revised Statutes. To accomplish this, these terms should be added to subsection (c) of the bill. (Page 5, lines 1-4).

The Department urges the Committee to pass this bill only if these concerns are addressed. Thank you for the opportunity to testify.

MCCORRISTON MILLER MUKAI MACKINNON LLP
ATTORNEYS AT LAW

March 1, 2016

Honorable Sylvia Luke, Chair
Honorable Scott Y. Nishimoto, Vice Chair
Committee on Finance
House of Representatives
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill No. 2560, House Draft 1, relating to Corporations.

Dear Chair Luke Vice-Chair Nishimoto and Committee Members:

On behalf of the American Family Life Assurance Company of Columbus (AFLAC), we respectfully submit the following testimony on House Bill No. 2560, House Draft 1, relating to corporations, which is to be heard by your Committee on Finance on March 2, 2016.

House Bill No. 2560, House Draft 1, proposes to require domestic and foreign corporations authorized to do business in the State of Hawaii to disclose contributions and independent expenditures made in connection with Hawai'i elections. AFLAC would like to offer the following comments on House Bill No. 2560, House Draft 1.

First, while the information to be disclosed is limited to Hawai'i elections, House Bill No. 2560, House Draft 1, appears to mandate that the disclosures be made to non-Hawai'i shareholders. In the case, especially, of foreign corporations that have shareholders in multiple states, query whether shareholders in other states have an interest in receiving information about Hawai'i elections that would justify the cost of having to deliver such information to them? As discussed below, that concern can be mitigated to some degree by allowing corporations to satisfy the disclosure requirement by making the information available on their corporate website.

Second, many companies already disclose political contributions on their corporate website and we respectfully suggest that House Bill No. 2560, House Draft 1, be amended to allow compliance via disclosure on the corporation's website. This would avoid the substantial cost and administrative burden that otherwise would be incurred in having to mail the information separately to shareholders, who, as noted above, may or may not be interested in the information. In the case of publicly-traded companies, the number of shareholders may be in 10,000s and the burden of an annual mailing may be substantial. *See also* Attorney General's testimony on House Bill No. 2560 submitted to the House Judiciary Committee (noting that degree of burden imposed is consideration for constitutional scrutiny).

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Thank you for your consideration of the foregoing.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP

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